Supreme Court, U.S.
FILED

981590 DEC 23 1998

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Anna Miller, pro se -PETITIONER

V

Togo West, Acting Secretary
United States Department of
Veteran's Affairs -
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Anna Miller

2461 S. Illinois Ave, Lot 63

Carbondale, IL 62901

(618) 549-3338

5011

QUESTIONS PRESENTED FOR REVIEW

1. Whether the pertinent regulations promulgated by defendant are within his statutory authority regarding 38 U.S.C. @ 4109 now 38 U.S.C. @7426 RETIREMENT RIGHTS and 38 U.S.C. @ 4110 now 38 U.S.C. @ 7461-7464 DISCIPLINARY AND GRIEVANCE PROCEDURES?

2. Whether all relevant fact were considered by District and Appellate courts regarding 29 C.F.R. @ 1613.214 (a)(1)(i) regarding equitable tolling, final decision to terminate plaintiff and was Miller's complaint of discrimination timely filed?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i
TABLE OF CITATIONS.....iii
OPINIONS BELOW.....1
JURISDICTION.....1
CONSTITUTION AND STATUTORY PROVISIONS.....2
STATEMENT OF THE CASE.....6
PROCEEDINGS BELOW.....13
REASONS FOR GRANTING THE PETITION.....19
CONCLUSION.....22

TABLE OF CITATIONS

Chardon v. Fernandez Supreme Court of the United States No. 81-249 Nov. 2, 1981; 27 FEP Cases 57.....9, 18

Franklin v. Massachusetts Cited 52 CCH S.Ct. Bull P. B3476.....10

Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1284 (7th Cir. 1977).....14

Lever v. Northwestern University 979 F.2d 552, 556, (7th Cir. 1992).....17

PETITION FOR WRIT OF CERTIORARI

Anna Miller respectfully petitions for a Writ of Certiorari to review and reverse the order of the Appellate and District courts of the seventh circuit, Chicago Illinois.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit, Chicago Illinois, filed July 29, 1998 is unpublished. The order in the United States District Court, Central Division, filed January 30, 1995 May 2,1997 and September 8, 1997, are unpublished.

JURISDICTION

This was an employment discrimination claim. Count I was based on the Rehabilitation Act of 1973, 29 U.S.C §§ 791. Count II was based on the Age Discrimination in Employment Ace ("ADEA"), 29 U.S.C. §§ 633a. Count III was a claim for injunctive relief to allow an appeal to a Disciplinary Appeals Board, 38 U.S.C. §§ 7461.

For the Rehabilitation Ace claim, District Court subject matter jurisdiction was based on 29 U.S.C. §§ 791(g) , which adopted the procedure in 42 U.S.C. §§ 2000e-5f, which provided subject matter jurisdiction. For the ADEA claim, district court subject matter jurisdiction was based on 29 U.S.C. §§ District Court subject matter jurisdiction was based on 28 U.S.C. §§ 1331 (federal question).

The Court's Appellate jurisdiction is based on 28 U.S.C. §§ 1291. The final decision of the District Court, dismissing the final claim, was September 8, 1997. (Doc.81) The notice of appeal (Doc.83) was filed on November 7, 1997, and was timely. Fed.R.App.P. 4 (a)(1).

The United States Court of Appeals decided my Case July 29,1998.

An extension of time to file the petition for the Writ of Certiorari was granted and included December 23, 1998 on October the 23, 1998 in application number A-338. The jurisdiction of this court is invoked under 28 U.S.C. §§ 1254 (1).

My petition for a Writ of Certiorari was mailed December 23, 1998. I received a letter from the clerk stating I had 60 days to correct my petition, from the date of the letter, January 29, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States, Amendment V "No person shall be deprived of life, liberty or property without due process of law."

2. Title 5, US Code of Regulations, Part 7.02, section 2951. Office of Personal Management's authority to Prescribe Reporting Requirements. "Processing Personal Actions," Chapter 3, subchapter 1, section 1-3. "No personal action can be made effective prior to the date on which the appointing officer approved the action. By approving an action, the appointing officer certifies that the action meets all legal and regulatory requirements."

3. STATUTORY PROVISIONS

38 U.S.C. §§ 4109 now 38 U.S.C §§ 7426, RETIREMENT RIGHTS "Persons appointed to the administration shall be subject to the provisions of and entitled to benefits under subchapter III of chapter 84, of title 5 [5 USCS §§ 8331 et seq.] or subchapter II of chapter 84 of

title 5 [5 USCS §§ 8410 et seq.], whichever is applicable." Regulations for disability retirement indicated by the agency is in Federal Personal Manual (FPM) supplement 831-1 subchapter S10 section S10-10. A pertinent section relative to this case states "the available evidence should be such that it will warrant consideration of the employee's removal from the service under adverse action procedures if medical findings do not support disability retirement."

38 U.S.C § 4110 DISCIPLINARY BOARDS "(a) The Chief Medical Director under regulations prescribed by the Administrator shall from time to time appoint boards to be known as disciplinary boards, each such board to consist of not less that three nor more than five employees, senior in grade, of the Department of Medicine and Surgery, to determine, upon notice of and fair hearing, charges of ineptitude, inefficiency or misconduct of any person employed in a position provided in paragraph (1) of section 4104 of this title. The majority of employees on a disciplinary board shall be employed in the same category of position as the employee who is the subject of the charges. (d) A disciplinary board, when in it's judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, which shall include reprimand, suspension without pay, reduction in grade, and discharge from the Department of Medicine and Surgery of such person. The Administrator shall either approve the recommendation of the board, approve such recommendation with modification or exception, approve such recommendation and suspend further action at the time, or disapprove such recommendation. He shall cause to be executed such action as he approves. The decision of the Administrator shall be final." Regulations to implement this statute are found in VA Policy Manual DM and S supplement MP-5 part II chapter 8 DISCIPLINARY ACTIONS, GRIEVANCES

AND HEARINGS Section A. DISCIPLINARY ACTIONS. Chapter 8, 5c.
"Initiation of Proposed Action (1) The Medical Officer, highest authority at the station, will assure that a thorough preliminary inquiry is conducted to obtain all of the facts prior to the official initiator of a request to proposed employee's view in the matter. When initiating proposed disciplinary action more severe that admonishment or reprimand, the station [head] will forward the preliminary inquiry and any pertinent comments of station officials to the Chief Medical Director for review. Chapter 8, 6a. If review of the facts by the Chief Medical Director results in the preparation of a letter of charge proposing disciplinary action more severe than reprimand, it will be prepared in Central Office.
(4) That he will be given a hearing by a Disciplinary Board as outlined in section C of this chapter, if he makes a written request for it within the specific reasonable time period."
This regulation was in effect in January of 1991 when Miller was terminated. The laws and regulations were revised in May of 1991.
Under Chapter 8 in the revised edition, Section A Disciplinary and Major Adverse Action Number 6f (2) The decision official will give full and impartial consideration to the employee's reply, if any, and all evidence of record. if the decision officials find that one or more charges in the advance notice are sustained, (4) If the notice of proposed action is determined to be procedurally defective to the detriment of the employee's substantive rights, the notice of proposed action will be rescinded and a NW notice of proposed action issued.
Section B. Grievances, 14 the following actions and complaints are excluded from coverage. (g) Complaints arising from actions taken due to the individual's physical or mental condition. Prior to 1991 the regulations stated under

section B 4. f. complaints arising from actions taken due to the individual's physical condition.

VA Policy Manual DM&S Chapter 9 SEPARATIONS section 9.03 AUTHORITY AND RESPONSIBILITY b. Chief Medical Director or Designees approves all involuntary separations for disability of employees in non centralized positions which are review in Central Office.

Section 9.04 FPM Supplement 296-33 provides further instructions regarding nature of actions. Table 31-B. Rule 16 "if separation is because of mental or physical disability and separation is effective under Agency procedures equivalent to 5 U.S.C. 75 (adverse action) the equivalent would be 38 U.S.C § 4110 now 38 U.S.C. §§ 7461-7464. Then the Nature of action code (NOAC) is 354 Nature of Action (NOA) is termination-disability.

Section 9.07 of Chapter 9 SEPARATION FOR DISABILITY a. When a decision to separate an employee for disability is made under the provisions of chapter 10 of this supplement, the facility Director will inform the employee in writing, specifying the reasons for the separation. The notice will either be given directly to the employee and the employee requested to acknowledge receipt, or mailed by certified mail at least 15 days in advance of the separation date. During the notice period, the employee should be placed on sick leave, annual leave, or leave without pay, as appropriate. Employees who meet service requirements will be notified of disability retirement eligibility and procedures. The separation will not be delayed if the employee applies for retirement.

38 U.S.C. § 4104 ADDITIONAL APPOINTMENTS

There shall be appointed by the Administrator additional personnel as the Administrator may find necessary for the medical care of veterans, as follows (1) nurses.

29 C.F.R. § 1613 (a)(1)(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

STATEMENT OF THE CASE

1. Miller was appointed to her position as a registered nurse at the Danville, Illinois Veterans Administration Medical Center, November 7, 1973. Under 38 U.S.C. § 4104 (1)
2. She had completed her probationary period and had permanent tenure with a property right to her job.
3. Miller was not allowed to work after September 8, 1989. She provided 4 notes from her doctor, not one of them said she could not work. The note on 10-11-90, stated she could perform all duties she had previously performed with a diagnosis of fibromyositis. (Exhibit 7 at trial)
4. On December 15, 1990, she was given a letter from the Medical Center Director dated December 12, 1990. It stated that "the Physical Standards Board agreed with Dr. Rohrshchieb that a diagnosis of fibromyositis limits your physical capacity. You are no longer able to perform the duties and responsibilities of your position." This was inconsistent with the note Miller gave nursing service on 10-11-90. The letter also stated "the board has recommended your separation for disability. Your separation will be effective January 5, 1991. " It also stated that "you may request a review of this action by the Chief Medical Director within 14 days of receipt of this letter. If you request a review, the complete records of the case along with any

statements or other evidence you desire to submit will be forwarded to the Chief Medical Center."

5. Miller did request this review as instructed in the above reference letter.

6. The decision to terminate Miller's employment was based upon the recommendation of the Danville V.A.'s Physical Standards Board which was formed for the purpose of determining Miller's physical fitness for duty.

7. Miller believed the VA Danville Physical Standards Board had made a mistake, because they did not have all of the medical documents. This was not discrimination it was a mistake that would be corrected upon review.

8. Miller testified (pg. 24 from transcript of hearing) that she wasn't informed about the review; the evidence they [Physical Standards Board] were going to make their determination on. Page 44 (transcript of hearing), Miller states "Because to my knowledge, the Physical Standards Board did not have my note from Dr. Rohrscheib, nor the statement that she made that I sent to the Office of Personnel Management. I included both of these when I sent it to the Chief Medical Director" These were Plaintiff's exhibit 7 & 8.

9. Miller had applied for disability retirement. It had been denied. (Plaintiff's exhibit 10-15) This reinforced her belief that a mistake had been made regarding her termination and on review it would be corrected.

10. Miller's reason for contacting the Equal Employment Opportunity counselor on July 16, 1992 : (Miller's testimony pg. 42) July 14, 1992 I read a couple of articles regarding discrimination. That older people were discriminated against because they had more aches and pains. This made me aware that all I had was aches and pains and therefore, I could possibly be discriminated against."

11. At this point in time Miller did not know what was discriminatory about her termination.

12. 568 days after Miller requested review of the action by the Chief Medical Director, she received the July 13, 1992 letter. (Plaintiff's exhibit 3) Miller had to request the assistance of Representative Terry Bruce's office to get this response. (transcript pg. 21)

13. The July 13, 1992 letter from Sanford M. Garfunkel Associate Chief Medical Director for Operations states: "Your separation was reviewed by the VA Central Office Physical Standards Board and it's evaluation was considered by the Chief Medical Director. His decision is to sustain the Medical Center Directors' decision to separate you for disability. A review of all available medical documentation relating to your condition at the time of your separation indicates that you did not meet the physical requirements for continued employment as a registered nurse." The letter also states that this was a final decision.

14. The VA Central Office Physical Standard Board's recommendation and remarks states: "The VACO Physical Standards Board recommends that Ms. Miller be returned to duty. This is consistent with the reports of Dr. A. Rohrscheib who, in a 10-15-90 letter stated: 'It is very unlikely this individual would suffer injury or harm if she were not restricted assuming that she has appropriately physically rehabilitated herself after having been off the job for such a long period of time. I don't recommend this individual be restricted from performing her duties except that she should probably be allowed a period of time in which to harden herself on the job.'"

15. The VACO Physical Standards Board met on April 22, 1992 their findings state: "The Board recommended at that time (April 22) that Ms. Miller be restored to duty. They met again on June 15, 1992, to consider a letter from the Director, VAMC Danville recommending that the facility's action's be upheld. They decided not to change their original recommendation that Ms. Miller be restored to

duty. The Board's recommendation was forwarded to the Chief Medical Director, who reviewed all available medical documentation relating to Ms. Miller's condition at the time of her separation. He determined that she did not meet the physical requirements for continued employment as a registered nurse when she was separated, and sustained the facility's decision to separate Ms. Miller for disability."

16. Miller requested a review of the action, not medical documentation.

17. VA Policy Manual DM&S Supplement MP5 Part II Chapter 9 section 9.03 AUTHORITY AND RESPONSIBILITY (b) Chief Medical Director approves all involuntary separations for disability of employees in non centralized positions, which are reviewed in central office.

18. "No personal action can be made effective prior to the date on which the appointing officer approves the action. By approving an action the appointing officer certifies that the action meets all legal and regulatory requirements." From Processing Personnel Actions chapter 3 section 1-3.

19. The Chief Medical Director was required to approve the action taken by the Medical Center Director in Danville Illinois. He sustained the Medical Center's Director's decision to separate Miller, this did not approve the action. Therefore, there has been no final decision communicated to Miller and there has been no effective date for the action taken by the Medical Center Director.

20. Period within which terminated employees were required to file suit under 42 U.S.C. § 1983 began to run when they received letters notifying them that final decision had been made to terminate their appointments, not when their employment terminated. *CHARDON V. FERNANDEZ et.al., Supreme Court of the United States No. 81-249, November 2, 1981; 27 FEP Cases 57*

21. "An agency action is 'final' when an agency completes it's decision making process and the result of that

process is one that will directly affect the parties." *FRANKILN V. MASSACHUSETTS Cited 52 CCH S.Ct. Bull. p. B3476*

22. Miller testified on pg. 20 of the transcript that she believed that the July 13, 1992 letter was a response to the letter she sent requesting the review. This letter states this is a final decision. Miller contacted the EEOC Counselor July 16, 1992. This was within 30 days of the decision Miller believed to be final.

23. The Medicalfendant would be terminated effective January 5, 1991. Docket No. 50 "the plaintiff contends that even with the actual or constructive knowledge of the EEO counselor within 30 days of receipt of the attached letter because she did not perceive that she had been discriminated against at that time. The plaintiff alleges to and the Defendant denies that he plaintiff believed this in part because prior to December 1990, she had received a preliminary determination from the Office of Personnel Management in rer be given directly to the employee and the employee requested to acknowledge receipt, or mailed by certified mail at least 15 days in advance of the separation date. During the notice period the employee should be placed on sick leave, annual leave, or leave without pay, as appropriate. Employees who met service requirements will be notified of disability retirement eligibility and procedures. The separation will not be delayed if the employee applies for retirement."

24. Defendant's attorney argued throughout the bench trial that disability retirement was not relevant. His own exhibit 15 contradicts his statement.

25. 9.07 regulations are not the regulations mandated by Congress under 38 U.S.C. § 4109 now 38 U.S.C. § 7426 RETIREMENT RIGHTS. The regulations to implement the statute for disability retirement is found in FPM Supplement 831-1 subchapter S10, and "procedural responsibilities of

agency when it considers acting upon deficiencies ins employee's service caused by a possible health problem" is section S10-10. Of significance here is (a)(3) Establishing a prima facie case "the available evidence should be such that it will warrant consideration of the employee's removal from the service under adverse action procedures if medical findings do not support disability retirement."

26. The Medical Center Director testified on pg. 83 of the transcript regarding Standard form 50, notification of personal action, he explained everything on the form except the nature of action code which was 354.

27. VA Policy Manual DM&S Supplement MP5 part II chapter 9 section 9.04 "FPM supplement 296-33 provides further instructions regarding nature of actions."

28. FPM Supplement 296-33 Table 31-B. Rule 16 "if separation is because of mental or physical disability and separation is effective under Agency procedures equivalent to 5 U.S.C. 75 (adverse action) the equivalent would be 38 U.S.C § 4110 now 38 U.S.C. §§ 7461-7464. Then the Nature of action code (NOAC) is 354 Nature of Action (NOA) is termination-disability.

29. VA Policy Manual DM&S Supplement MP-5 Part II chapter 8 section a DISCIPLINARY ACTIONS section (5)(c) INITIATION OF PROPOSED ACTION (1) The Medical Officer, highest authority at the station, will assure that a thorough preliminary inquiry is conducted to obtain all of the facts prior to the official initiator of a request for proposed action, including those facts relating to the employee's view in the matter. When initiating proposed disciplinary action more severe that admonishment or reprimand, the station [head] will forward the preliminary inquiry and any pertinent comments of station officials to the Chief Medical Director for review. Chapter 8, 6a. If review of the facts by the Chief Medical Director results in the preparation of a letter of charge proposing disciplinary action

more severe than reprimand, it will be prepared in Central Office.
(4) The letter will inform the employee that he will be given a hearing by a Disciplinary Board as outlined in section C of this chapter, if he makes a written request for it within the specific reasonable time period." This regulation was in effect in January of 1991 when Miller was terminated. The laws and regulations were revised in May of 1991.
30. The July 1992 letter from the Chief Medical Director states that "A review of all available medical documentation" was made. This would be appropriate for an initiation of proposed action. According to regulatory requirements in effect in December of 1990.
31. His decision was to sustain the Medical Center's Director's decision to separate Miller. According to the regulations in effect in July of 1992 under chapter 8 section a DISCIPLINARY ACTION. No. 6 MAJOR ADVERSE ACTION (f) Arriving at a Final Decision on a Proposed Action (2) the decision official will give full and impartial consideration to the employee's reply, if any, and all evidence of record. If the decision official find that one or more charges in the advance notice are sustained, he or she will determine appropriate action. (4) If the notice of the proposed action is determined to be procedurally defective to the detriment of the employee's substantive rights, the notice of proposed action will be rescinded and a new notice of proposed action will be issued.
32. The only notification Miller received was the termination notice December 12, 1990. There was no notification of proposed action. This was detrimental to Miller's substantial rights to a hearing before the Disciplinary Appeals Board and her constitutional right to due process before being deprived of her property right to her job.

33. This was an intentional violation of Miller's rights. The Department of Veteran's Affairs identified the adverse action procedure on the S.F. 50 Notification of Personal Action by the Nature of Action Code as 354.
34. The action taken by the Medical Center Director was also discriminatory because there are no physical requirements for the Registered Nurse position only that you be able to perform the duties and responsibilities of the position. This was stated by Dr. Rohrschieb (exhibits 7 & 8 entered at trial).

PROCEEDINGS BELOW

Miller filed a pro se complaint on December 29, 1993. A bench trial was held on January 30, 1995. The court ruled depending on which letter constitutes final termination for employment she either did or did not fulfill the timeliness requirement of contacting an EEO counselor within 30 days of termination. This factual issue of when Miller's termination actually happened precluded summary judgment. The letters referred to are dated December 12, 1990 and July 13, 1992.

On April 11, 1997, a bench trial was held on count 1 and 2 of Miller's second amended complaint of discrimination. The District Court Judge's statement on his ruling (pg., 96 of transcript) "I think that the issues are quite clear now. And that with the stipulation that was entered, we really are resolving a matter or equitable issue. The bottom line is that I rule in favor of the Veterans' Administration and against the Plaintiff. And I'm going to direct Mr. Hoff, that you prepare a proposed order of finding." he then stated "But it seems to me that the burden has not been met. And even if we were to get into a dichotomy of sifting over and going through all of this mountain of paperwork and plethora of notices and letters and so forth, that 550 days, there's just no

way that Mrs. Miller could not have been charged constructively with knowing that she's got to go to an EEO officer and so forth."

As the case in Flowers V. Crouch-Walker Corp., 552 F.2d 1277, 1284 (7th Cir. 1977) After observing that "the district court had adopted (in that case) without change findings of fact and conclusions of law prepared by the defendant, said: 'a critical view of a challenged finding is appropriate whereas here the findings of fact and conclusion of law of which it is a part were not the original product of a disinterested mind.'"

In the court order filed May 2, 1997, incorrect statements under the evidence (1) "the letter (December 12,1990) informed Miller that she could request a review of the termination decision. The letter stated Miller could request a review of the action." Review of the action is to determine if law and regulatory requirements were met. A review of the termination decision would be appropriate for the initiation of the proposed action. (2) "The termination of her employment was affirmed in July 1992. Miller learned of the decision to affirm her termination in a letter dated July 13, 1992." This letter did not affirm the termination of Miller's appointment. The July 1992 letter only sustained the Medical Center Director's decision this is appropriate for a proposed action. (3) Before the trial the plaintiff and defendant stipulated to various facts: That Plaintiff had constructive knowledge of the 30 day time limit to contact an EEO counselor prior to and when she was notified on December 15, 1990 that her employment with Defendant would be terminated effective January 5, 1991. Docket No. 50 "the plaintiff contends that even with the actual or constructive knowledge of the EEO administrative notice requirements she would not have contacted an EEO counselor within 30 days of receipt of the December 12, 1990 letter because she did not perceive that she had been

discriminated against at that time. The plaintiff alleges and the defendant disputes the plaintiff believed this in part because prior to December 1990, she had received a preliminary determination from the Office of Personnel Management in response to her application for disability retirement benefits, the defendant disputes the relevance of this preliminary determination. Defendant's exhibit 15 (VA Policy Manual DM&S Supplement MP-5 part II chapter 9 section 9.07) contradicts his statement regarding the relevancy of the determination from the Office of Personnel Management in response to Miller's application for disability retirement. The exhibit 15 states that employees will be notified of disability retirement eligibility and procedures. (4) During the trial the Plaintiff and Defendant stipulated that "the alleged discriminatory event for purposed of this litigation occurred on December 15, 1990, when Plaintiff was handed a letter form the Danville Veterans Administration Medical Center Director stating that here employment was being terminated effective January 5, 1991 because of her disability." This stipulation was made April 11, 1997 with the knowledge and information Miller had on that day. She testified that on December 15, 1990 or January 1, 1991 she did not know or believe this action to be discriminatory. She believed a mistake had been made that would be corrected upon review. Miller's attorney's statement (pg. 51-52 trial transcript) "Well, Your Honor, 1992 is after 1990. So what she did in 1992 was based on knowledge she had acquired up to that time. In 1992, she had already been applying for disability retirement benefits. She had already been denied disability retirement benefits by OPM. She knew that OPM had medical evidence from doctors who had actually seen her. She knew that she had been separated from the VA based on the recommendation of a Physical Standards Board from doctors who had not seen her. It was reasonable for her to put more credence in the

medical opinions of doctors who had actually examined her than doctors who hadn't." he continued "And, when she had a federal agency, the Office of Personnel Management, agreeing with what her own opinion was anyhow; which was th at she's not disabled and she's able to do her job and wants to get back to work, and that's exactly what Office of Personnel Management is telling her; it reinforced her own beliefs. And this is all knowledge she had prior to getting Donald Riedl's letter in 1990. So this is relevant to the issue whether, when she got Donald Riedel's letter, she thought she had been discriminated against or whether she thought some bureaucratic mistake had been made. Because of what Mr. Hoff is talking about, because there are not clear lined of communication between the VA and OPM, because it is tow distinct agencies."

(5) Miller's attorney's response to defendant's motion for direct verdict (pg. 73 transcript) "Well, Your Honor, we object to that. The relevant regulation is Section 1613.124 (a). She is required to contact and EEO counselor within 30 days of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action. She did not know that she had been discriminated against, or that she may have been discriminated against in January of 1991 or in December of 1990. She knew that she had received a letter saying she was going to be terminated. But for the reasons that we got into earlier, there's a difference between thinking that you've been discriminated against." The rest of the response is in the transcript. Miller believed that a mistake had been made and would be corrected upon review, and it was. The Central Office Physical Standards Board recommended Miller be returned to duty based on one of the documents Miller provided with her request for review. The order makes no mention of Miller's testimony or her

attorney's statements regarding equitable tolling instead, it compares this case with *Lever V. Northwestern University*, 979 F.2d 552, 556,(7th Circuit 1992) this case differs from Lever in that the District Court in Lever found the Dean had and exercised the authority to terminate a career at Northwestern-and that Lever knew it. In this case, when Miller requested a review of the action, the authority to approve this action went to the Chief Medical Director. DM&S Supplement MP-5 Part II Chapter 9 section 9.03 and as of this date the action taken by the Medical Center Director has not been approved. Miller filed her complaint of discrimination after receiving the July 13, 1992 letter which stated this is a final decision. She filed her complaint within 30 days of what she believed to be the final decision. The order states "in conclusion that plaintiff has failed to prove any legal basis upon which the court should extend for more than 550 days the 30 days time period in which she should have initially contacted an EEO counselor concerning the termination of her employment. Accordingly, the Court hereby dismisses counts I and II of plaintiff's second amended complaint." Miller states the order was prepared by defense attorney after the judge had ruled in his favor. All relevant facts were not considered. She requests that this order be reversed.

On September 8, 1997, the court directed the parties to file summary judgment motions regarding count III. On count III of Miller's second amended complaint, Miller asked the court to order defendant to provide her the Disciplinary Board hearing regarding her dismissal pursuant to 38 USC § 7464. Only defendant filed a motion for summary judgment Miller responded to that motion through her attorney and in addition, Miller herself filed a number of documents. The court stated these documents were largely irrelevant, they concerned the requirements for disability retirement and chapter 8 DM&S Supplement MP-5 Part II. Miller's attorney

requested oral argument and it was denied. The court ruled that Miller was not entitled to a hearing before a Disciplinary Appeals Board because the department's decision to exclude discharges for disability seems to be completely in accord with the statute.

United States Court of Appeals decided this case July 29, 1998. The Court of Appeals affirmed the District Court's actions of dismission of Miller's discrimination claims based on her failure to timely contact an equal employment opportunity counselor and granted the Department's motion for summary judgment on her injunctive claim. Mistakes made in appeals court order: again the court states that Miller requested review of the termination decision, Miller requested a review of the action taken by the Medical Center Director. The review Miller requested was not executed. A review of the action is to determine if law and regulatory requirements were met. A review of the termination decision is appropriate for a proposed action. Since Miller's termination has never been approved by the Chief Medical Director as required, there is no effective date for her termination. The stipulations as explained in the previous court order are repeated here. There is no acknowledgment of Miller's testimony, or her attorney's statements regarding equitable tolling. The time period to file a discrimination complaint begins to run on the day the employee learns about the adverse decision. This is incorrect, because the time begins to run when the employee learns of the final decision to terminate their employment. *CHARDON V. FERNANDEZ et.al., Supreme Court of the United States No. 81-249, November 2, 1981; 27 FEP Cases 57*

The Appellate court states, Miller was not improperly denied review before a disciplinary board because a discharge for disability differs from a discharge involving a 'question of professional conduct or competence' or a discharge based on 'charges of inaptitude, inefficiency, or

misconduct.' Further, Miller was given the review she was entitled to under Department regulations." This is incorrect, Miller was not given the review she was entitled to under department regulations. Miller requested a review of the action, review of the action is to determine if law and regulatory requirements are met. "And no personal action can be made effective prior to the date on which the appointing officer approved the action." The Chief Medical Director has not approved the Medical Center Director's action in this case. (Processing Personnel Actions Chapter 3). And Miller did not appeal pursuant to a grievance procedure regulation established in accordance with 38 U.S.C. §§ 7461(b)(2), 7463. DM&S MP-5 Part II chapter 8 Section B Grievances (14) the following actions and complaints are excluded from coverage's. (g) Complaints arising from actions taken due to the individual's physical or mental condition. Prior to 1991 the regulations in Chapter 8 section B Grievances (4) (f) complaints arising from actions due to the individual's physical condition are excluded. Miller requests that the Appeal's Court order be reversed.

REASONS FOR GRANTING THE PETITION

When Congress established a Department of Medicine and Surgery within the Department of Veterans Affairs, they provided by statute a special personnel policy for the professionals (doctors, dentists, nurses, etc.) to be employed in the Department of Medicine and Surgery, the implementation of these statutes was given to the administrator of the Department of Veterans' Affairs. These regulations are not required to be published in the Code of Federal Regulations. Miller could not find these regulations in any library. They are contained in the VA Policy Manual DM&S Supplement MP5 Part II. In this case the department provided regulations that only appeared to comply with the

required law and concealed the required procedure by a code number on the standard form 50. This case not only effects Miller, but all the professionals that are employed by the Department of Medicine and Surgery and their constutional and statuatory right to a hearing before being deprived of their property right to their job and the right to be free from discrimination. The Department claims that this policy manual Chapter 9 Separations section 9.07 entitled Separation for disability provided the regulations to terminate Miller's appointment for disability it also states that employee would be entitled to disability retirement. 38 U.S.C. § 4109 now 38 U.S.C. § 7426 RETIREMENT RIGHTS the implementation of this statute for disability retirement is in Federal Personnel Manual 831-1 Subchapter S10 DISABILITY RETIREMENT S10-10(a) is Procedural Responsibility of Agency when it considers acting upon deficiencies in an employee's service caused by a possible health problem. The department did not comply with these requirements. Miller had applied for disability retirement, and it had been denied. Therefore, section 9.07 is not the correct procedure that would entitle Miller to disability retirement.

SF-50, Notification of Personnel Action, gives the code number 354 as the nature of action. FPM Supplement 296-33 Table 31B Rule 16. "If separation is because of mental or physical disability and separation is effective under Agency procedures equivalent to 5 U.S.C. 75 (adverse action) the equivalent would be 38 U.S.C § 4110 now 38 U.S.C. §§ 7461-7464. Then the Nature of action code (NOAC) is 354 Nature of Action (NOA) is termination-disability. The regulations to implement the statute is found in VA Policy Manual DM&S Part II.

Defendant continually states that Miller requested a review of the termination decision. Miller requested a review of the action. A review of the action is to determine

if law and regulatory requirements were met. The Chief Medical Director was required to approve the action, by approving the action, he certifies that law and regulatory requirements were met. And no action can be made effective prior to the date the action is approved. The Chief Medical Director did not approve the action, therefore there has been no effective date for the action. A review of the termination decision would be appropriate for a proposed action. And the sustaining of the Medical Center Director's decision would also be appropriate for a proposed action. In sustaining the decision the employee was to have received notification of their right to a disciplinary court hearing. Regulations in Chapter 8 of the manual.

Miller is petitioning the Supreme Court to determine if regulatory requirements in the VA Policy Manual DM&S Supplement MP5 Part II carry out the mandates of Congress regarding 38 U.S.C. § 4109 now 38 U.S.C. § 7426 and 38 U.S.C. § 4110 now 38 U.S.C. § 7461-64. Errors in lower courts: her termination was affirmed in the July 13 letter. Miller's termination was not affirmed, only the Medical Center Director's decision was sustained in the July letter. Error by Appeals Court: " the department allowed her to appeal pursuant to a grievance procedure regulation established in accordance with §§ 7463(b)(2). This is an error because "complaints arising from actions taken due to the individual's physical or mental condition" are excluded from the Grievance Procedure.

Although there has been no final decision communicated to Miller regarding her termination, Miller filed her complaint of discrimination after receiving the July 13, 1992 letter which stated that "this was a final decision," and she believed it to be the final decision.

Neither the District or the Appellate court considered Miller's testimony, supported by evidence, and her attorney's statement regarding equitable tolling. Their determination

was based on the stipulation made at trial. This stipulation was made with the knowledge and understanding Miller had on April 11, 1997. She testified that on December 15, 1990, January 5, 1991, she did not believe the action taken against her was discriminatory. She considered it a mistake that would be corrected upon review. She had no set of facts that would support a claim of discrimination at that time.

CONCLUSION

The petitition for the writ of certiorari should be granted.

Respectfully submitted,

Anna Miller

Date: March 30, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 29, 1998

Decided July 29, 1998 Unpublished
Not to be Cited
Before Per Cricuit Rule 53

Hon. RICHARD A. POSNER, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

ANNA MILLER, Appeal from the United States
Plaintiff-Appellant, District Court for the Central District of Illinois.

No. 97-3841 v. No. 93-CV-2297

TOGO WEST,** Richard Mills,
Defendant-Appellee Judge.

ORDER

Anna Miller brought a claim against the Secretary of the Department of Veterans Affairs (Department) alleging that she was unlawfully terminated because of her disability

in violation of the Rehabilitation Act of 1793, 29 U.S.C. § 792 *et seq.* and her age in violation of the Age Discrimination in Employment Act, 29 U.S.C § 621 *et seq.* She also sought an injunction compelling the Department to allow her to appeal her termination before a Disciplinary Appeals Board pursuant to 38 U.S.C. §§ 7461(b)(1), 7464. The district court dismissed her discrimination claims based on her failure to timely contact and equal employment opportunity (EEO) counselor and granted the Department's motion for summary judgment on her injunctive claim. Miller appeals. We affirm.

Miller worked for the Veterans Affairs Medical Center in Danville, Illinois as a registered nurse. On or about December 15, 1990, Miller received a letter from the Medical Center Director explaining that her employment would be terminated effective January 5, 1991. The reason given for her discharge was that her physical disability, fibromyositis, made her unable to perform the duties and responsibilities of her position and that there were no suitable positions available for reassignment. The letter advised that Miller could request a review of the termination by the Chief Medical Director within 14 days of receipt of the letter. Miller requested that review in a timely fashion. She subsequently received a letter dated July 13, 1992, informing her that the review had been conducted and that the termination decision had been sustained by the Chief Medical Director. Miller contacted and EEO counselor on July 16, 1992, approximately 579 days after she was notified that she was being terminated because of her disability.

At the time Miller received notification that she was being terminated, 29 C.F.R. § 1613.214(a)(1)(i)(1990) required a federal employee who believed she was being

discriminated against to contact an EEO counselor within 30 days of the allegedly discriminatory event. See Miller v. Runyon, 77 F.3d 189,191 (7th Cir.), cert. denied, 117 S. Ct. 316 (1996). The 30-day time limit acts as a statue of limitations but it subject to the doctrines of equitable estoppel, equitable tolling, and the discovery rule. See id; Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-53 (7th Cir. 1990).

Miller and the Department stipulated that Miller's action was time-barred unless she complied with the 30-day time limit of § 1613.214(a)(1)(i) or the court extended time limit by equitable tolling. The parties also stipulated that the alleged discriminatory event occurred on December 15, 1990, when Miller received the letter stating that she would be terminated because of her disability. Further, Miller stipulated that at that time she received the December 15 notification letter, she had constructive knowledge of the 30-day time limit to contact an EEO counselor. Although Miller, for obvious reasons, repentedly states that we may not rely on her stipulations, a party's stipulations are binding and may not be controverted at trial or on appeal. Keller v. United States, 58 F.3d 1194, 199 n.8 (7th Cir. 1995). Therefore, the record shows that Miller failed to contact an EEO counselor within 30 days.

The district court properly determined that Miller failed to show the following (1) that the Department caused her to miss the deadline through misleading representations or otherwise prevented her from bringing suit in time (equitable estoppel); (2) that despite all due diligence she was unable to obtain vital information bearing on the existence of her claim (equitable tolling); or (3) that she did not discover the alleged discrimination until July 1992, particularly in light of Miller's stipulation that she knew on

December 15, 1990 that she was being fired due to her disability (discovery rule). Miller argues that her delayed contact with a counselor should be excused because her

termination has not been properly approved under the review requirements. This argument is unconvincing because the time period begins to run on the date the employee learns about the adverse decision, regardless of whether the termination takes effect on a later date or the employee can appeal the decision. See Librizzi v. Children's Mem'l Med. Ctr., 134 F.3d 1302, 1306 (7th Cir. 1998). Therefore, the district court correctly dismissed Miller's discrimination claims as untimely.

Miller also asserts that her termination due to disability was an implied charge of inaptitude, entitling her to a review by a Disciplinary Appeal Board pursuant to 38 U.S.C. §§ 7461(b)(1), 7464. Pursuant to the Administrative Procedure Act, we review agency action to determine if it is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a); see Smith v. Office of Civilian Health and Med. Program of Uniformed Services, 97 F.3d 950, 954 (7th Cir. 1996), cert denied, 117 S. Ct. 1027 (1997).

Under § 7461(b)(1) individuals employed by the Department pursuant to 38 U.S.C. § 7401, such as Miller, whose discharge involves a "question of professional conduct or competence," have the right to bring an appeal before a Discipline Appeals Board. Prior to May 1991, employees facing "charges of inaptitude, inefficiency, or misconduct" were entitled to a hearing before a disciplinary board. 38 U.S.C. § 4110(a)(repealed); see Hannon v. Turnage, 892 F.2d 653, 657-58 n.4 (7th Cir. 1990). Because Miller's case was not pending until after § 7461 replaced § 4110, we apply

§ 7461 to this case. Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. 102-40, § 205(b) 105 Stat. 187, 207-8. But regardless of which statute we apply, Miller was not improperly denied review before a disciplinary board because a discharge for disability differs from a discharge involving a "question of professional conduct or competence" or a discharge based on "charges of inaptitude, inefficiency, or misconduct." Further, Miller was given the review she was entitled to under Department regulations. The only time that we analyzed either § 4110 or § 7461, we held that although the terms inaptitude, inefficiency, and misconduct "could be read broadly to apply to almost any disciplinary action by the [Department]," we would not do so. Hannon, 892 F.2d at 658 n.5. In Hannon, we held that the chief of surgery's dismissal from the Department on the basis that his appointment was void differed from a dismissal for inaptitude, inefficiency or misconduct, and, accordingly, did not entitle him to review by a disciplinary board. Id. at 657-58. Similarly, in this case, a dismissal based on disability differs from a discharge based on "a question of professional conduct or competence," which the statute defines as a question involving either Supp. 308, 312 (N.D.Ill. 1995) (granting summary judgment for Department and holding that physician discharged for insubordination an unsatisfactory attendance was not entitled to an appeal before a Disciplinary Appeals Board pursuant to § 7461(b)(1) because the reasons for his discharge did not involve a question of professional conduct or competence). Because Miller's dismissed did not involve a question of professional conduct or competence, the Department allowed her to appeal pursuant to a grievance procedure regulation established in accordance with §§ 7461(b)(2), 7463; see Mitchum v. Hurt, 73 F.3d 30,32 (3d Cir. 1995) (explaining

the Department review process for cases that do not involve a "question of professional conduct or competence" or a major adverse action). Under this regulation, Miller requested and received a review of her discharge by the Chief Medical Director. Therefore, the Department's action was not "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS--SPRINGFIELD DIVISION

FILED
MAY 02 1997
JOHN M. WATERS, Clerk
US. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANNA MILLER,
Plaintiff.

v.

No. 93-2297

JESSE BROWN, Secretary of
Department of Veterans Affairs

Defendant

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court following a bifurcated bench trial.

I. BACKGROUND

The Court has reviewed the pleadings, legal memoranda, and stipulations of the parties and has heard evidence from Plaintiff and Defendant during the bench trial conducted on April 11, 1997. The Court hereby dismisses

Count I and Count II of the Second Amended Complaint because Plaintiff failed to contact an Equal Employment Opportunity (EEO) counselor for more than 550 days after

she learned that Defendant intended to terminate her employment because of her disability.

In her Second Amended Complaint, Anna Miller alleges that Defendant unlawfully discriminated against her in that Defendant terminated her because of her disability and because of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) (ADEA).

The Rehab Act is the exclusive remedy for federal employee's claims of disability discrimination in employment. Similarly, the ADEA is the exclusive remedy for federal employee's claims of age discrimination in employment. The regulations at 29 C.F.R. § 1613.213(a)(1)(i) required federal employees to contact and EEO counselor within 30 calendar days of an occurrence of alleged age or disability discrimination. At the time of the events leading to this lawsuit, the regulations provided:

> (a)(1) An agency shall require that a complaint be submitted in writing by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if:
>
> > (i)The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory personnel action or the date the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action. . . .

29 C.F.R. § 1613.214(a)(1)(i) (1990)

In addition, a federal employee who alleges discrimination under the ADEA has two alternatives when commencing her claim. She may sue in federal district court after giving the EEOC 30 day's notice of intent to sue, 29 U.S.C. § 633a(d). Alternatively, she may file an agency complaint and, after final disposition on the merits by the EEOC, may sue in federal district court. McGinty v. US Dept. of Army, 900 F.2d 1114, 1116-17 (7th Cir. 1990). In this case, Plaintiff attempted to follow the second alternative.

Failure to meet the statutory time limits, including the 30 day time limit to contact EEO counselor after the occurrence of an alleged discriminatory event is not a jurisdictional defect that bars suit. Instead, the time limit operates as a statue of limitations and is subject to the doctrine of equitable tolling, equitable estoppel, and the "discovery rule." Rennie v. Garrett, 896 F.2d 1057, 1062-63 (7th Cir. 1990); see also Baldwin County Welcome Center v. Brown, 466 US. 147, 150-51 (1984); Thelen v. Marc's Big Boy Corp., 64 F.3d 264, 267 (7th Cir. 1995)

II. THE EVIDENCE

The sole issue at trial was whether Miller contacted an EEO counselor within 30 days after her termination or failed to do so but should not be barred from proceeding based on one of the equitable doctrines listed above.

Miller worked as a registered nurse at the Danville, Illinois Veterans Administration Medical Center from November 7, 1973 until January 5, 1991. On December 15, 1990, Peter Rudolph, Personnel Specialist, hand delivered to Miller a letter dated December 12, 1990, which was written

by Donald Reidl, the medical director of the Danville Veterans Administration Medical Center. Th letter advised Miller that her employment would be terminated effective January 5, 1991, and informed her that she could request a review of the termination decision. Miller did request that review, and the termination of her employment was affirmed in July 1992. Miller learned of the decision to affirm her termination in a letter dated July 13, 1992 from Sanford M. Garfunkel, Associate Chief Medical Director for Operations of the Department of Veterans Affair. Miller contacted an EEO counselor on July 16, 1992.

Before the trial, Plaintiff and Defendant stipulated to various facts, which are incorporated herein by reference. These included the stipulated facts set forth in the pretrial order and the stipulation that Plaintiff had constructive knowledge of the 30 day time limit to contact an EEO counselor prior to and when she was notified on December 15, 1990 that her employment with Defendant would be terminated effective January 5, 1991. During the trial, Plaintiff and Defendant further stipulated that:

> 1. The alleged discriminatory event for purposes of this litigation occurred on December 15, 1990 when Plaintiff was handed a letter from the Danville Veterans Administration Medical Center Director stating that her employment was being terminated effective January 5, 1991 because of her disability; and
>
> 2. Plaintiff's employment with Defendant was terminated effective January 5, 1991, and Plaintiff since December 15, 1990 has known that her employment was being terminated effective January 5, 1991 because of her disability.

III. ANALYSIS

Although Plaintiff did not contact EEO counselor concerning the termination of her employment until July 16, 1992, she alleged in her Second Amended Complaint that her failure to contact an EEO counselor concerning the termination of her employment should be excused because:

> 1. Her position of employment with Defendant was not terminated until July 13, 1992.
>
> 2. She did not reasonably know until July 1992 that the termination of her employment on January 5, 1991 was discriminatory for purposes of equitable tolling.
>
> 3. Defendant in his letter of December 12, 1990 "actively mislead" Plaintiff concerning her administrative remedies.

Based upon the stipulation the parties entered during the trial, the Court will disregard Miller's first and second contentions. Specifically, the parties stipulated that the alleged discriminatory event was the December 15, 1990 delivery of the letter from Reidl and they agreed that Miller has actually known that her employment was being terminated because of her disability since that date. Based on those stipulations, the Court finds that Miller did not contact an EEO counselor "within 30 calendar days of the date of the alleged discriminatory personnel action, or the date [she] knew or reasonably should have known of the discriminatory event or personnel action..." 29 C.F.R. § 1613.214(a)(1)(i) (1990). The only remaining question is whether the Court should permit Miller to proceed on her Rehab Act or ADEA claims based on the doctrines of equitable tolling or equitable estoppel, or based on the

discovery rule. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990) (describing equitable doctrines).

Equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." Id. at 451. Where the alleged discrimination is termination of employment, neither an appeal of that decision nor a deferred final date of termination postpone the time within which the employee must make a charge of employment discrimination. Lever v. Northwestern University, 979 F.2d 552, 556 (7th Cir. 1992), cert. denied, 508 US. 951 (1993). The facts in this case do not support the equitable tolling of the limitation period from December 15, 1990, when Plaintiff was advised that her employment was being terminated to July 16, 1992, when Plaintiff first contacted an EEO counselor. Consequently, the doctrine of equitable tolling does not excuse Plaintiff's failure to timely contact an EEO counselor in this case.

Equitable estoppel "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not the plead the statue of limitations." Cada, 920 F.2d at 451-52. Noting in the record of this case supports a finding that Defendant took active steps to prevent Miller from suing in time. The former medical director for the Danville Veterans Administration Medical Center, Donald Reidl, testified that he signed the letter of December 12, 1990 advising Miller that her employment would be terminated effective January 5, 1991, and that she could request a review of that action by the Chief Medical Director in Washington D.C. He stated that when Miller requested tat review, he was authorized by the Department of Veterans Affairs regulations set forth in the DM&S Supplement, MP-

5, chapter 9, to postpone her separation from employment with Defendant pending completion of that review. Reidl then explained his rationale for not electing to postpone the January 5, 1991 date for termination of her employment. If her had elected to postpone her separation date, Reidl further explained that Miller would have received a separate letter telling her that her employment was not being terminated effective January 5, 1991, and that the government SF-50 form, notice of personnel action, would not have been issued.

Miller, over Defendant's objection, testified that when she received the December 12, 1990 letter advising her that her employment would be terminated effective January 5, 1991, she had already received and initial denial of disability retirement benefits for the Office of Personnel Management, based on that agency's determination that the medical evidence did not establish a physical disability that would prevent her from doing her job. Miller further testified, over Defendant's objection, that the inconsistency between the findings of the Office of Personnel Management and the findings of the Department of Veterans Affairs led her to believe that the decision to terminate her would be reversed once she requested the review in the December 12, 1990 letter.

Miller stipulated, however, that she knew on December 15, 1990 that Defendant was terminating her employment because of her disability. Under 29 C.F.R. §161..214(a)(1)(i), Miler should have contacted an EEO counselor within 30 days after that date. The fact that Plaintiff relied upon the information provided by the Office of Personnel Management resulting in the initial denial of her request for disability retirement in November 1990 does not satisfy the requisite elements for equitable estoppel as outlined in Tyler v. Runyon, 70 F.3d 458, 466 n.9 (7th Cir.

1995)("Equitable estoppel, 'quite distinct from equitable tolling,' comes into play when a defendant, takes active steps to prevent the plaintiff from suing in time, such as promising not to plead the statute or limitations. In cases involving the United States, estoppel is applicable if the government's actions constitute affirmative misconduct and if four additional requirements are satisfied....")(citations omitted).

Consequently, Plaintiff cannot rely upon the doctrine of equitable estoppel to excuse her failure to contact an EEO counselor for more than 550 days after she was told on December 15, 1990 that her employment would be terminated effective January 5, 1991.

The discovery rule likewise does not help Miller. Miller stipulated that she knew on December 15, 1990 that she was being fired because of her disability. Thus, she cannot claim that she only discovered the disability discrimination in July 1992 when her termination was affirmed.

IV. CONCLUSION

Plaintiff has failed to prove any legal basis upon which the Court should extend for more than 550 days the 30 day time period in which she should have initially contacted an EEO counselor concerning the termination of her employment. Accordingly, the Court hereby dismisses Counts I and II of Plaintiff's Second Amended Complaint.

Plaintiff in Count III of her Second Amended Complaint seeks an injunction against Defendant. Plaintiff or Defendant or both parties may file a motion for summary judgment concerning Count III of Plaintiff's Second Amended Complaint within 60 days after entry of this order.

If the motions are denied then the Court will schedule a Rule 26 conference for the remaining issues in this case.

Ergo, IT IS ORDERED, ADJUDGED AND DECREED that Count I and Count II of Plaintiff's second amended complaint are hereby dismissed.

Plaintiff and Defendant shall submit cross motions for summary judgment concerning Count III of Plaintiff's Second Amended Complaint within 60 days after entry of this order. If either no motions are submitted or the motions are denied, then the Court will set cause for a Rule 26 conference for all issues then remaining in this case.

ENTER: 1 May. 1997

FOR THE COURT:

RICHARD MILLS
United States District Judge

United States District Court
for the Central District of Illinois
April 11, 1997

Case Minutes - General
Case No. 2:93-cv-02297
Title: Miller v. Brown

*** DATE OF OCCURRENCE: 4/11/97 ***

DOCKET ENTRY

MINUTE-ENTRY: by Judge Richard Mills. BENCH TRIAL. Atty. John McMahon present with pltf. AUSA David Hoff present for Deft. Pltf presents evidence. Pltf rests. Deft moves for directed verdict at close of pltf's case. Motion denied without prejudice. Deft presents evidence. Deft rests. Deft renews motion. Court finds for the deft and against the pltf. Written order to be entered. Bench trial ended. (cc: all counsel)

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS--SPRINGFIELD DIVISION

FILED
SEP - 8 1997
JOHN M. WATERS,Clerk
US DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANNA MILLER,
Plaintiff.

v.

No. 93-2297

JESSE BROWN, Secretary of Department of Veterans Affairs

Defendant

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Defendant's Motion for Summary Judgment on Count III of Plaintiff's Second Amended Complaint.

I. BACKGROUND

A. Procedural History

In her Second Amended Complaint, Anna Miller alleges that Defendant unlawfully discriminated against her in that Defendant terminated her because of her disability in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. (1994) (Rehab Act), and because of her age in

violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) (ADEA). In Count III of her Second Amended Compliant, Miller asks the Court to order Defendant to conduct a review of her dismissal pursuant to 38 U.S.C. § 7464.

The Court ruled, after a bench trial, that Miller had not timely contacted an EEO counselor regarding her discrimination complaints. See 29 C.F.R. § 1613.24(a)(1)(i). Thus, the Court dismissed the first two counts of Miller's Second Amended Complaint and directed the parties to file summary judgment motions regarding Count III.

B. Facts

Miller worked as a registered nurse at the Danville, Illinois Veterans Administration Medical Center from November 7, 1973 until January 5, 1991. Miller was employed pursuant to 38 U.S.C. § 4104(1), which has since been recodified as 38 U.S.C. § 7401. On January 5, 1991, Miller was terminated because of her disability. In the letter informing Miller of the decision to terminate her, Defendant informed Miller that she could request a review of the termination decision. Miller did request the review, and the termination of her employment was affirmed in July 1992.

II. SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "should be granted if the pleadings and supporting documents show that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Ruiz-Rivera v. Moyer 70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the

burden of proving proper documentary evidence to show the absence of a genuine issue of material fact exists when "there is sufficient evidence favoring the non moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby Inc., 477 US. 242, 249 (1986). Courts must consider evidence in the light most favorable to the non moving party. Adickes v. S.H. Kress & Co., 398 US. 144 (1970).

III. ANALYSIS

In Count III, Miller claims she is entitled to have her termination reviewed in the manner prescribed by 38 U.S.C. §§ 7461 and 7464. Defendant argues that those provisions do not apply to Miller since she was discharged because of her disability.

A. Which Law Applies?

Currently, persons employed by the Department of Veterans Affairs pursuant to 38 U.S.C. § 7401 are entitled to certain protections, mandated by 38 U.S.C. §7461, if they are discharged or otherwise subject to adverse personnel action as a result of "charges based on conduct or performance," §7461(a), or "professional conduct or competence," § 7461(b)(1). If an employee is subject to "major adverse action" (such as discharge) because of questions about his or her professional conduct or competence, the person is entitled to a hearing before a disciplinary appeals board. Prior to May 7, 1991, employees charged with "inaptitude, inefficiency, or misconduct" were entitled to a hearing before a disciplinary board. 38 U.S.C. § 4110(a) (1984) (repealed).

Initially, the parties disagree over which statute applies to Miller's discharge. Defendant argues that 38

U.S.C. § 4110 (the old law) applies. Miller asserts that 38 U.S.C. § 7461-64 (the new law) apply. Defendant points to a provision in the Department of Veterans Affairs Health Care Personnel Act of 1991, Pub. L. 102-4-, 105 Stat. 187, as support for his position. That provision § 205(b) provides:

> With respect to cases pending on the date of the enactment of this Act, or those cases which are brought before the establishment of either an administrative grievance procedure pursuant to section 7463 of title 38, United States Code (as added by the amendments made by this title), or a negotiated grievance procedure established under a collective bargaining agreement, such cases shall proceed in the same manner as they would have if the Act had not been enacted.

Pub.L. 102-40, § 205(b), 105 Stat. 208 (1991). Defendant asks the Court to read this provision as applying old law to all discharges or other personnel actions that occurred before or on May 7, 1991, the effective date of the Department of Veterans Affairs Health Care Personnel Act of 1991. That reading, however, is not supported by the plain language of § 205(b): the section refers to pending cases, which the Court takes to mean lawsuits. This lawsuit was not filed until December 29, 1993, long after the time when the new provisions relating to appointment of disciplinary appeals boards became effective. Accordingly, the Court will apply the new law: 38 U.S.C. § 7461-64.

B. Miller is Not Entitled to a Hearing Before a Disciplinary Appeals Board

The Department of Veterans Affairs terminated Miller because it believed she was disabled (i.e. physically unable to do her job). The special procedures established in Title 38 protect only employees discharged for reasons relating to professional incompetence or, under the old law, "inaptitude, inefficiency, or misconduct." Discharges for disability fall outside the plain language of both the old and the new statutory provisions. Cf. Gergans v. Brown, 911 F. Supp. 308, 312 (N.D. Ill. 1995) (holding that a physician terminated for insubordination was not entitled to a hearing before a disciplinary appeals board under § 7462). Additionally, the special procedures established by §§ 7461-64 seem designed to provide employees an opportunity to defend themselves against fault-based discharges bearing on their professional competence, and hence their future employability in their chosen field. A Discharge for disability has nothing to do with fault or professional competence, and thus is not covered by § 7464. This conclusion is supported by the fact that Congress has passed remedial legislation to aid employees discharged because of a disability. Indeed, in this case, Miller has attempted unsuccessfully to utilize one such statute, the Rehab Act, to pursue her claim of disability discrimination.

Defendant also cites Department of Veterans Affairs regulations (known as DM&S Supplement MP5, Part II, Chapter 9) which address discharges of nurses based on disability. These regulations do not call for review of such discharges by a disciplinary appeals board. In view of the statutory language discussed above, the Court cannot say that the Department's regulations are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); See Gergans, 911 F. Supp. at 311 (reviewing the Department's decision on how to treat a

discharge for insubordination under the Administrative Procedure Act, 5 U.S.C. §§ 500-706). To the contrary, the Department's decision to exclude discharges for disability from the disciplinary appeals board process seems to be completely in accord with the statute.

Ergo, Defendant's Motion for Summary Judgment on Count III of Plaintiff's Second Amended Complaint (d/e 65) is ALLOWED. This case is dismissed with prejudice each party to bear it's own costs.

ENTER 8 Sept., 1997

FOR THE COURT:

RICHARD MILLS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANNA MILLER,
Plaintiff,

v.

JESSE BROWN, Secretary of
Department of Veterans Affairs

Defendants.

FILED
JAN 30 1995
JOHN M. WATERS,Clerk
US DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 93-2297

ORDER

This case involves the termination of Anna Miller from her position at the Danville Veterans Administration Medical Center. Currently before the court is the defendant's Motion for Summary Judgment.

The plaintiff, Ms. Anna Miller, was formerly a nurse at the Danville VA. hospital. She was terminated from her nursing position due to physical disability. She received a letter from the VA. Director, Mr. Donald Riedl, stating that she would be separated for disability effective on January 5, 1991. Subsequently she received a letter from the national V.A.'s Associate Chief Medical Director for Operations on July 13, 1992. This second letter states a decision to sustain the Danville V.A.'s "decision to separate you for disability." This letter also apologized for the "delay in reaching a final

decision." Ms. Miller contacted an EEO counselor on July 16, 1992.

Ms. Miller filed a pro se complaint on December 29, 1993. She has since retained counsel. In her amended complaint, Ms. Miller alleges violations of the Rehabilitation Act of 1973 and the ADEA. She also requested injunctive relief. The defendant moved for summary judgment arguing that the complaint is time barred. The defendant correctly states, and the plaintiff agrees that an age or disability discrimination complainant must contact an EEO counselor within 30 days of the final termination decision. Depending on which letter constitutes final termination of her employment, she either did or did not fulfill the timeliness requirement of the factual issue, of when Ms. Miller's termination actually happened, precludes summary judgment.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 US. 317, 322 (1986); Herman v. National Broadcasting Co., Inc., 744 F.2d 604, 607 (7th Cir. 1984), cert. denied, 470 US. 1082 (1985). "[I]n determining whether factual issues exist, a reviewing court must view all the evidence in the light most favorable to the non-moving party." Black v. Henry Pratt Co., 778 F.2d 1278, 1281 (7th Cir. 1985). However, Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"

Cleotex, 477 US. at 322. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party there is no 'genuine' issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Cop., 475 US. 574, 587 (1986).

IT IS THEREFORE ORDERED that the defendant's Motion for Summary Judgment (docket # 27) is denied.

IT IS FURTHER ORDERED that a Rule 26(f) meeting between the parties to discuss discovery issues and a discovery schedule shall be held on or before February 10, 1995.

IT IS FURTHER ORDERED that discovery shall be concluded by May 26, 1995, and a final pretrial conference shall be set for June 5, 1995, 9:00 a.m., at the courthouse in Urbana.

ENTER THIS 30th day of January, 1995.

HAROLD A. BAKER
SENIOR UNITED STATES DISTRICT JUDGE